

MOST INDEPENDENT CONTRACTORS AREN'T

WHAT HAPPENED?

Earlier this year, the U.S. Department of Labor ("DOL") issued a Wage and Hour Division **Administrator's Interpretation** that reasserts a broad definition of employee such that employers will rarely find that the individuals who work for them can be classified as independent contractors. This interpretation, although not having the effect of law, does indicate the DOL's enforcement position in addressing the misclassification of workers under the Fair Labor Standards Act of 1938 ("FLSA").

WHAT FACTORS ARE USED IN DETERMINING EMPLOYEE STATUS?

The courts and the DOL look at six factors in determining whether a worker is an employee or an independent contractor under the FLSA. None of the factors is controlling, and all are weighed together:

1. The extent to which the work performed is an **integral part** of the employer's business;
2. The worker's **opportunity for profit or loss** depending on his or her **managerial skill**;
3. The extent of the **relative investments** of the employer and the worker;
4. Whether the work performed requires **special skills and initiative**;
5. The **permanency** of the relationship; and
6. The **degree of control** exercised or retained by the employer.

Using these factors, if the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself and economically independent from the employer, then the worker is an independent contractor. Labels and contractual language are not determinative of a worker's status. Significantly, even if a worker is determined to be an employee, the law does not allow the worker to waive employee status. The DOL has provided detail about each of the factors. Below is a summary of the key takeaways.

- *Integral part of employer's business.* If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer. Work can be integral to an employer's business even if it is performed away from the employer's premises, at the worker's home or on the premises of the employer's customers.
- *Opportunity for profit or loss dependent on managerial skill.* In considering whether a worker has an opportunity for profit or loss, the focus is whether the worker's managerial skill can affect his or her profit and loss. Simply working more or fewer hours to increase or decrease personal income is not the same as using managerial skill that affects profit and loss risk.
- *Worker's relative investment.* The worker should make some investment and therefore undertake at least some risk for a loss in order for there to be an indication that he or she is an independent business. For example, a worker who simply provides his or her preferred cleaning supplies will not be an independent contractor when the cleaning company provides insurance, transportation and equipment and gives the worker a Form 1099-MISC. The worker's investment in cleaning supplies does little to further a business beyond that particular job.
- *Special skill and initiative.* A worker's business skills, judgment and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent. For example, just being a highly skilled carpenter working for the same company will not make the worker an independent contractor. However, that same skilled carpenter could be an independent contractor if he or she provides a specialized service for a variety of area construction companies. For example, fabricating custom cabinets may be demonstrating the skill and initiative if the carpenter markets the services, determines when to order materials and the quantity of materials to order and determines which orders to fill.
- *Permanent or indefinite relationship.* Permanency or indefiniteness in the worker's relationship with the employer suggests that the

worker is an employee. Most workers are engaged on a permanent or indefinite basis as in the indefinite employment-at-will relationship. The key is whether the lack of permanence or indefiniteness is due to operational characteristics of the industry or the worker's own business initiative. For example, agency nurses are part of a transient workforce that reflects the nature of their profession and not their success in marketing their skills independently.

- *Employer control.* The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business. For example, a nurse registry trains its nurses and sends a weekly listing of potential clients. The nurse is required to adhere to a certain wage range and inform the registry before contacting any client or if the nurse is hired by the client. The nurse is not allowed to provide care during any weekend hours and is required to contact the registry if a scheduled shift will be missed. This nurse would be an employee because the registry exercises significant control. On the other hand, where a nurse is free to call on as many or as few clients as the nurse desires and negotiates the nurse's own wage rates with the client, this would indicate an independent contractor relationship because of the lack of significant control by the registry.

HEADS-UP FOR EMPLOYERS - MISCLASSIFICATION IS THE TARGET

The Wage and Hour Division is working with the IRS and more than two dozen states to combat employee misclassification and to ensure that workers get the wages, benefits and protections to which they are entitled. In some cases, the DOL is cooperating with the Employee Benefits Security Administration, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs and the Office of the Solicitor. At the same time, the National Labor Relations Board has broadened the definition of employee that it uses for purposes of determining who is eligible to vote in union elections and who is protected under the NLRA.

PRACTICAL TAKEAWAYS

Health Care employers are increasingly looking for cost saving measures, which often can include the retention of "independent contractors." At the same time, several federal agencies are focusing on these decisions - agencies who have the ability to levy back pay, penalty and liquidated damage awards. Misclassification can occur in the retention of physicians, nurses, transcriptionists, environmental service workers and more. We recommend the following action steps.

1. If you have not already acted, audit your use of independent contractors. As we have discussed in previous articles, both the DOL and the IRS have also decided to crack down on employers who improperly classify their employees as independent contractors. (See our related blogs: [DOL Says Most Workers Are Employees Not Independent Contractors](#); [Independent Contractors or Employees - IRS Gives Employers Something to Consider](#); [Worker Misclassification Issues - How Are Hospitals at Risk?](#); and [Joint Employment - NLRB Broadly Redefines the Standard](#).)
2. Have your independent contractor agreements reviewed and updated by counsel. The agreements should accurately reflect independent contractor status by addressing the factors that federal agencies and the courts use in determining employee status.
3. Create and/or enforce a process whereby the status of an individual as a prospective independent contractor is reviewed and documented, in advance, again using the factors that federal agencies and the courts use in determining employee status. For consistency purposes, this review should be done using standardized forms and should be done by the same person(s).

If you have any questions or would like additional information about this topic, please contact:

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